

## **401 KAR 101:020. Financial requirements.**

RELATES TO: KRS 224.01-410, EO 2008-507, 2008-531

STATUTORY AUTHORITY: KRS 224.01-410(8), EO 2008-507, 2008-531

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.01-410(8)(d) requires the cabinet to promulgate administrative regulations to establish standards and procedures to certify contractors for the cleanup of contaminated methamphetamine properties. EO 2008-507 and 2008-531, effective June 16, 2008, abolish the Environmental and Public Protection Cabinet and establish the new Energy and Environment Cabinet. This administrative regulation establishes the financial assurance requirements for certified contractors.

Section 1. Applicability. (1) This administrative regulation applies to contractors certified by the cabinet to cleanup methamphetamine contaminated properties after July 15, 2008.

(2) Contractors certified by the cabinet to cleanup methamphetamine contaminated properties prior to July 15, 2008, who do not maintain financial assurance shall meet the requirements of this administrative regulation to continue to be certified to cleanup methamphetamine contaminated properties.

Section 2. Financial Assurance Criteria. (1) The financial assurance criteria and bond requirements apply to each contractor or company certified by the cabinet to engage in the decontamination of contaminated properties that were used for the production or processing of methamphetamine.

(2) Prior to the issuance of a certification to provide decontamination services, financial assurance shall be:

(a) Submitted;

(b) Reviewed; and

(c) Approved by the cabinet if the contractor is in compliance with the requirements of this administrative regulation.

Section 3. Financial Assurance Amounts. (1) A contractor certified by the cabinet shall provide financial assurance corresponding to the level of contamination of the inhabitable property.

(a) A contractor applying for certification to clean up contaminated property assessed as a Tier 1, Tier 2, or Tier 3 level of contamination shall post and maintain financial assurance in the amount of at least \$100,000.

(b) A contractor applying for certification to clean up contaminated property assessed as a Tier 4 level of contamination shall post and maintain financial assurance in the amount of at least \$250,000.

(2)(a) A contractor certified with the cabinet prior to July 15, 2008 shall be required to maintain at least the \$50,000 financial assurance, regardless of the tier level of cleanup.

(b) A contractor certified with the cabinet prior to July 15, 2008, who does not maintain the \$50,000 financial assurance, shall meet the requirements of subsection (1) of this section.

Section 4. Financial Mechanisms. (1) The mechanisms used to demonstrate financial assurance in accordance with this administrative regulation shall ensure that the funds necessary to meet the costs of cleanup of contaminated properties shall be available within thirty (30) days of the issuance of a cabinet demand letter.

(2) The certified contractor shall execute and submit a performance agreement, as established in Section 5 of this administrative regulation, with one (1) or more of the financial mech-

anisms established in Sections 6 through 10 of this administrative regulation that satisfy the following criteria:

(a) The amount of financial assurance obtained from a single financial institution shall not exceed the limit of federal insurance if the assurance is provided by a financial institution that uses federal insurance to guarantee the availability of funds.

(b) The cabinet shall demand forfeiture of the financial assurance if the certified contractor fails to act with reasonable care and judgment in the performance of decontamination services or is fraudulent or deceitful in the submission of inaccurate data or qualifications.

Section 5. Performance Agreement. (1) Before the cabinet issues a certification, the applicant shall:

(a) Complete and notarize a performance agreement pursuant to subsection (2) of this section; and

(b) Post at least one (1) of the following financial assurance mechanisms pursuant to KRS 224.01-410:

1. A surety bond as established in Section 6 of this administrative regulation;
2. A letter of credit as established in Section 7 of this administrative regulation;
3. An escrow agreement as established in Section 8 of this administrative regulation;
4. A financial self-insurance test as established in Section 9 of this administrative regulation;

or

5. A corporate guarantee as established in Section 10 of this administrative regulation.

(2) A performance agreement, guaranteeing performance of cleanup to allowable limits, shall be completed and notarized on Performance Agreement, DEP 6079D, January 2009.

Section 6. Surety Bond. (1) A surety bond shall be completed and notarized on Surety Bond, DEP 6079B, January 2009.

(2)(a) To be eligible to issue a surety bond, a surety shall be listed as acceptable in the current edition of U.S. Treasury Circular 570.

(b) The penal sum of the bond shall not exceed the amount of the surety's underwriting limitation.

Section 7. Letter of Credit. A letter of credit shall be completed and notarized on Irrevocable Letter of Credit, DEP 6079C, January 2009.

Section 8. Escrow Agreement. (1) An escrow agreement shall be completed on Escrow Agreement, DEP 6079E, January 2009.

(2) If a certificate of deposit is used in conjunction with the escrow agreement, it shall be made payable to the financial institution as the escrow agent.

Section 9. Financial Self-Insurance Test. (1) A financial self-insurance test shall be completed and notarized on Financial Self-Insurance Test, DEP 6079F, January 2009.

(2) The applicant may satisfy the requirements of this administrative regulation by passing a financial test as established in this section. The applicant shall meet the following criteria:

(a) Less than fifty (50) percent of the applicants personal gross revenues shall be derived from contaminated methamphetamine cleanup operations, and the applicant shall:

1. Satisfy at least two (2) of the following ratios:

a. A ratio of total liabilities to net worth less than two and zero tenths (2.0);

b. A ratio of the sum of net income plus depreciation, depletion, and amortization to total liability greater than one-tenth (0.1); or

- c. A ratio of current assets to current liabilities greater than one and five-tenths (1.5);
- 2. Have net working capital and tangible net worth each at least six (6) times the amount of financial assurance required in Section 3 of this administrative regulation; or
  - (b) The applicant shall have tangible net worth of at least three (3) million dollars.
  - (3) To demonstrate that requirements of this test are met, the applicant shall submit the following items to the cabinet:
    - (a) A letter signed by the applicant, notarized, and worded as specified on Financial Self-Insurance Test, DEP 6079F, January 2009;
    - (b) A copy of a report by an independent certified public accountant examining the applicant's financial statements for the company's most recently completed fiscal year; and
    - (c) A special report from the applicant's independent certified public accountant to the applicant stating that:
      - 1. The auditor has compared the data that the letter from the applicant specified as having been derived from the independently audited year-end financial statements for the most recent fiscal year with the amounts in financial statements; and
      - 2. In connection with the procedure established in subparagraph 1 of this paragraph, if matters did not come to the auditor's attention that caused the auditor to believe that the specified data should be adjusted.
  - (4)(a) After the initial submission of the items specified in subsection (3) of this section, the applicant shall send updated information to the cabinet not later than ninety (90) days after the close of each succeeding fiscal year.
  - (b) This information shall include all three (3) items specified in subsection (3) of this section.
  - (5)(a) If the applicant no longer meets the requirements of subsection (2) of this section, notice shall be sent to the cabinet of the intent to establish alternate financial assurance, as specified in this administrative regulation.
  - (b) The notice shall be sent by certified mail not later than ninety (90) days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements.
  - (c) The applicant shall provide the alternate financial assurance not later than 120 days after the end of that fiscal year.
  - (6)(a) The cabinet may, based on a reasonable belief that the applicant no longer meets the requirements of this section, require reports of financial condition from the applicant in addition to those specified in subsection (2) of this section.
  - (b) If the cabinet finds, on the basis of these reports or other information, that the applicant no longer meets the requirements of subsection (2) of this section, the applicant shall provide alternate financial assurance as specified in this administrative regulation not later than thirty (30) days after notification of this finding.
  - (7)(a) The cabinet may disallow use of the financial self-insurance test on the basis of qualifications in the opinion expressed by the independent certified public accountant in the accountant's report on examination of the applicant's financial statements.
  - (b) An adverse opinion or disclaimer of opinion by the independent certified public accountant shall be cause for disallowance.
  - (c) The applicant shall provide alternate financial assurance as established in this administrative regulation not later than thirty (30) days after notification of the disallowance.
  - (8) The applicant shall no longer be required to submit the items specified in subsection (2) of this section if the applicant substitutes alternative financial assurance as established in this administrative regulation.

Section 10. Wording of a Corporate Guarantee. (1) A corporate guarantee shall be completed and notarized on Corporate Guarantee, DEP 6079G, January 2009.

(2) The applicant may satisfy the requirements of this administrative regulation by passing a financial test to offer a corporate guarantee sufficient to provide the financial assurance as established in this section, in which case the applicant shall meet the following criteria:

(a) Less than fifty (50) percent of the applicants corporate gross revenues shall be derived from contaminated methamphetamine cleanup operations; or

(b) The applicant shall:

1. Satisfy at least two (2) of the following ratios:

a. A ratio of total liabilities to net worth less than two and zero tenths (2.0);

b. A ratio of the sum of net income plus depreciation, depletion, and amortization to total liability greater than one-tenth (0.1); or

c. A ratio of current assets to current liabilities greater than one and five-tenths (1.5);

2. Have net working capital and tangible net worth each at least six (6) times the amount of financial assurance required in Section 3 of this administrative regulation; or

3. Have tangible net worth of at least ten (10) million dollars.

4. Have assets in the United States amounting to at least ninety (90) percent of total assets or at least six (6) times the amount of financial assurance required in Section 3 of this administrative regulation.

5.a. Have a current rating for a most recent bond issuance of AAA, AA, A, or BBB as issued by "Standard and Poor's" or AAA, AA, A, or BAA as issued by "Moody's";

b. Have tangible net worth at least six (6) times the amount of financial assurance required in Section 3 of this administrative regulation;

c. Have tangible net worth of at least ten (10) million dollars; and

d. Have assets located in the United States amounting to at least ninety (90) percent of total assets or at least six (6) times the amount of financial assurance required in Section 3 of this administrative regulation.

(3) To demonstrate that requirements of this test are met, the applicant shall submit the following items to the cabinet:

(a) A letter signed by the applicant's chief financial officer, notarized, and worded as specified on DEP Form 6079G;

(b) A copy of a report by an independent certified public accountant examining the applicant's financial statements for the most recently completed fiscal year; and

(c) A special report from the applicant's independent certified public accountant to the applicant stating that:

1. The auditor has compared the data that the letter from the chief financial officer specified as having been derived from the independently audited year-end financial statements for the most recent fiscal year with the amounts in those financial statements; and

2. In accordance with this paragraph, if matters did not come to the auditor's attention that caused the auditor to believe that the specified data should be adjusted.

(4)(a) After the initial submission of the items established in subsection (3) of this section, the applicant shall send updated information to the cabinet not later than ninety (90) days after the close of each succeeding fiscal year.

(b) This information shall include all three (3) items established in subsection (3) of this section.

(5)(a) If the applicant no longer meets the requirements of subsection (2) of this section, notice shall be sent to the cabinet of the intent to establish alternate financial assurance, in accordance with this administrative regulation.

(b) The notice shall be sent by certified mail not later than ninety (90) days after the end of the fiscal year for which the year-end financial data show that the applicant no longer meets the requirements.

(c) The applicant shall provide the alternate financial assurance not later than 120 days after the end of that fiscal year.

(6)(a) The cabinet may, based on a reasonable belief that the applicant no longer meets the requirements of subsection (2) of this section, require reports of financial condition from the owner or operator in addition to those established in subsection (3) of this section.

(b) If the cabinet finds, on the basis of these reports or other information, that the applicant no longer meets the requirements of subsection (2) of this section, the applicant shall provide alternate financial assurance as established in this administrative regulation not later than thirty (30) days after notification of this a finding.

(7)(a) The cabinet may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in the accountant's report on examination of the applicant's financial statements.

(b) An adverse opinion or disclaimer of opinion shall be cause for disallowance.

(c) The applicant shall provide alternate financial assurance as established in this administrative regulation not later than thirty (30) days after notification of the disallowance.

(8) The applicant shall no longer be required to submit the items specified in subsection (3) of this section if the applicant substitutes alternative financial assurance as established in this administrative regulation; or

(9)(a) The applicant may meet the requirements of this section by obtaining a written guarantee, hereafter referred to as a "parent corporate guarantee".

(b) The guarantor shall be the parent corporation of the certified contractor.

(c) The guarantor shall meet the requirements for applicants in subsections (2) to (7) of this section and shall comply with the terms of DEP Form 6079G.

(d)1. The parent corporate guarantee shall accompany the items sent to the cabinet as established in subsection (3) of this section.

2. The terms of the parent corporate guarantee shall provide that:

a. If the applicant fails to perform decontamination of a contaminated inhabitable property to the decontamination standards established in 401 KAR 101:040, the guarantor shall do so or shall establish a trust fund, in the name of the applicant, as established in Section 9 of this administrative regulation;

b. The parent corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the cabinet; and

c. Cancellation shall not occur, during the 120-day period beginning on the first day that both the applicant and the cabinet have received notice of cancellation, as evidenced by the certified mail return receipts.

(e) If the applicant fails to provide alternate financial assurance as established in this administrative regulation, and fails to obtain the written approval of this alternate financial assurance from the cabinet not later than ninety (90) days after both the contractor and the cabinet have received notice of cancellation of the parent corporate guarantee from the guarantor, the guarantor shall provide the alternate financial assurance in the name of the certified contractor.

Section 11. Use of Multiple Financial Mechanisms. (1)(a) The applicant may satisfy the requirements of this administrative regulation by establishing more than one (1) financial mechanism.

(b) These mechanisms shall be limited to the following:

1. Surety bonds;

2. Letters of credit;
3. Escrow agreements;
4. Financial self-insurance test; or
5. A corporate guarantee.

(2) The mechanisms shall be as established in Sections 5 through 10 of this administrative regulation respectively, except that it shall be the combination of mechanisms, rather than each single mechanism, that shall provide financial assurance for an amount at least equal to the financial assurance amounts established in Section 3 of this administrative regulation.

Section 12. Incorporation by Reference. (1) The following material is incorporated by reference:

- (a) "Performance Agreement", DEP 6079D, November 2016;
- (b) "Surety Bond", DEP 6079B, November 2016;
- (c) "Irrevocable Letter of Credit", DEP 6079C, November 2016;
- (d) "Escrow Agreement", DEP 6079E, November 2016;
- (e) "Financial Self-Insurance Test", DEP 6079F, November 2016; and
- (f) "Corporate Guarantee", DEP 6079G, November 2016.

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